atIN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 10715 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DAHYABHAI DAYALBHAI ROHIT & 1 - Petitioner(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :
MR HARIN P RAVAL for Petitioner(s) : 1 - 2.
MR LR PUJARI, AGP for Respondent(s) : 1 - 3.
MR DHIRENDRA MEHTA for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 22/03/2007

ORAL JUDGMENT

1. Shri H.P. Raval, learned counsel for the

petitioner; Shri L.R. Pujari, learned AGP for the respondents no. 1,2 and 3, Shri Dhirendra K. Mehta, learned counsel for respondent no.4.

2. The short facts necessary for disposal of the present writ application are that the Bank of Baroda, somewhere in the year 1975 filed Special Civil Suit No. 64 of 1976 against Jayantilal Chunilal Modi and Bhagvandas Chunilal Modi for recovery of principal amount of Rs. 7,000/- and interest thereon. The suit was ultimately decreed by the learned Civil Judge [Senior Division], Bharuch and decree was granted in favour of the Bank of Baroda against the said defendants. In the year 1981, Special Darkhast/Execution Application No. 23 of 1981 was filed by the Bank of Baroda against the Judgment Debtors for recovery of Rs.25,810/-. As the money was not paid by the Judgment Debtors, certain properties of the Judgment Debtors which were mortgaged with the Bank were asked to be auctioned. On 19.7.83, a public notice was issued, notifying that Blocks No. 9259 and 9256 belonging to the Judgment Debtors would be auctioned to satisfy the decree passed in Special Civil Suit No. 64 of 1976. It was directed that auction would take place on

19.8.83. The petitioners participated in the said auction and offered sum of Rs.9,500/-, which being the highest bid was accepted on 19.8.82. The matter was reported to the Court and after hearing the parties, the Court confirmed the sale in favour of the petitioners vide order dated 28.9.83. A certificate of sale [Annexure:C] was issued by the Court on 5.12.83 in favour of the petitioners. After becoming the owners under the court sale, the petitioners informed to the Revenue Authorities about acquisition of their rights who in their turn, made entry no. 5009 on 20.12.83 in favour of the petitioner no.1. On 13.1.84, entry no. 5013 was made in favour of the petitioner no.2. On 22.3.84, the above referred entries no. 5009 and 5013 were certified.

3. Almost after lapse of 11 years from the Court auction and 10 years from the date of the entries and their certification, the respondent no.4, namely Kanubhai Jayantilal Modi [son of Judgment Debtor] filed a revision application in the Court of the Collector, throwing challenge to the entries no. 5009 and 5013. The petitioners challenged the maintainability of the revision application and also raised various grounds, but

by order dated 14.4.94, the Collector, Bharuch, vide impugned order [Annexure:G] directed deletion of the entries.

4. Being aggrieved by the aforesaid order of the Collector, Bharuch, the petitioners filed revision application before the respondent no.2, which came to be rejected on 13.11.95. Being aggrieved by the orders passed by the Collector and the Deputy Secretary [Appeals], the petitioners are before this Court.

5. Shri Harin P. Raval, learned counsel for the petitioners submits that the subordinate authorities did not properly appreciate the legal provisions and unnecessarily interfered into the entries. According to him, so long as the Court sale stands, the petitioners would continue to be the owners of the property irrespective of the fact that whether there is an entry or not. According to him, when property is transferred by the Court in a Court sale, then, it is transferred free from all encumbrances and Judgment Debtor though is not acting voluntarily, but the sale deed would be taken to be voluntary deed. His submission is that the sale effected by the Court against the interest of Jayantilal Chunilal Modi

and Bhagvandas Chunilal Modi would bind their legal representatives, heirs and successors for all time to come. His submission is that if Jayantilal Chunilal Modi is bound by the Court sale, then, any person claiming through him would not be entitled to challenge the sale.

6. Shri Dhirendra K. Mehta, learned counsel for the respondent no.4 on the other hand, submits that the respondent no.4 did not challenge the sale by the Court, but he certainly was entitled to challenge the entries, according to him, entries could not be made unless all the requirements of the revenue laws were fulfilled.

7. Order XXI of the Code of Civil Procedure, 1908 relates to executions. Rule-82 to 96 of Order XXI relate to and control the Court sales. According to Rule 82, sales of immovable property in execution of decrees may be ordered by any Court other than a Court of Small Causes. If somebody is aggrieved by the public notice, then, he has to come before the Court and raise his objections. In case of sale confirmed by the Court is to be challenged, then, proceedings under Order XXI are required to be taken. Rule 89 provides that where immovable property has been sold in execution of

a decree, any person claiming an interest in the property sold at the time of the sale or at the time of making an application, or acting for or in the interest of such person, may apply to have the sale set aside on his depositing in Court, for payment to the purchaser a sum equal to five per cent of the purchase value and for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder. Where a person applies under Rule 90 to set aside a sale of his immovable property, he shall not, unless he withdraws his application be entitled to make or prosecute an application under Rule 89. Rule 90 provides for an application to set aside sale on ground of irregularity or fraud. Rules relating to sale of the property in execution are complete Code. If somebody wants to apply or propose to challenge the same, then, he has to take an action in accordance with law either by depositing the money or by filing his objections. Once a sale certificate is issued by the Court, then, such sale would be taken to be final and except as

provided under the law such sale and delivery of the property cannot be challenged.

8. It is further to be seen that Section 43[1AA] of the Bombay Tenancy & Agricultural Lands Act, 1948 provides that notwithstanding anything contained in sub-section[1], it shall be lawful for such tenant or a person to mortgage or create a charge on his interest in the land in favour of the State Government under particular Acts or in favour of the banks etc. The word “bank” has been defined in the Explanation appended to Section 43. Clause-[b] of the Explanation includes any subsidiary bank as defined in clause [k] of Section 2 of the State Bank of India [Subsidiary Banks] 1959. Undisputedly, Bank of Baroda is subsidiary bank of the State Bank of India. It is not in dispute before me that the land was mortgaged by the Judgment Debtors with the bank and the mortgagee under the common law had a right to obtain decree for sale of the property. Once the provisions of Section 43[1] are not applicable in view of Section 43[1AA] of the Act, then, mortgage would be legal mortgage.

9. Shri Pujari, learned AGP for the State submits that present is a case where Section 63 would

apply with its full force, according to him, under the Bombay Tenancy & Agricultural Lands Act, 1948, transfers to non-agriculturists are barred and as the present petitioners are non-agriculturists, no sale could be effected in their favour. It is submitted that no sale [including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenues or for sums recoverable as arrears of land revenue], gift, exchange or lease or any land or interest therein, shall be valid in favour of a person who is not an agriculturist. Language of Section 63 undisputedly puts ban on such transfer, but if Section 63 is read with Section 43[1AA], it will be clear that mortgage in favour of a bank would be valid. If a mortgage would be valid, then, provisions of Section 43[1AA] would override the provisions of Section 63[1][a] because Section 63 came in the statute book in the year 1948, while Section 43[1AA] was introduced vide Gujarat Act No. 16 of 1960 and was renumbered by President Act No. 37 of 1976 and Gujarat Act No. 30 of 1977. When the legislature being fully aware of the legal implications of the amendment introduces an amendment in the body of the Act, then, intention

of the government is to be understood in view of the attending circumstances.

10. It cannot be gainsaid that the mortgage does create an interest in the land. If Section 63[1][a] bars creation of interest in the land, then, Section 43[1AA] would become nugatory and intention of the government would fall. For harmonious construction, one has to understand the law after reading two provisions in juxtaposition. Section 43[1AA] and Section 63[1][a] are not mutually destructive, these can be read together to survive. Section 63[1][a] though puts an absolute bar even against a Court or against authorities for sale etc. of the property or for gift, exchange or lease or creation of interest, but Section 43[1AA] carves out an exception and permits an agriculturist/tenant to mortgage or create a charge or his interest in the land in favour of the State Bank or a Bank. If such procedure is permissible, then, it cannot be argued that Section 63[1][a] shall supersede subsequent provisions which were brought in the statute book to protect interest of the agriculturists/tenants from the land grabbers. The Government, in fact, wanted to confer an

authority upon the land owners that instead of selling their land for small money, they may mortgage land or create an interest of a bank in the land and with the time pay back the amount and get their land redeemed. Intention of the Government can never be to make an amendment which would be nugatory because of the existing provision or runs in conflict with the existing provisions.

11. In my opinion, Section 63 and Section 43 can stand together as there is no conflict in the said provisions.

12. Once it is held that Section 63[1][a], in view of Section 43[1AA] would not apply to a mortgage, then, provisions of civil law would authorize a bank to file a suit either for recovery of money, sale of the property or for foreclosure. If during final decree proceedings, decretal amount is not paid, then, under the authority of the Court, bank would be entitled to sell the property. Once bank sells the property through the agency of the Court, then, one cannot be allowed to say that sale was in breach of Section 63[1][a] of the Bombay Tenancy & Agricultural Lands Act, 1948. I must hold that Section 43[1AA],

in fact, would protect rights of the bank and consequently the rights which accrued in favour of the petitioners. The authorities have not properly appreciated the legal position and erred in granting application made by the respondent no.4.

13. The impugned orders passed by the authorities are hereby quashed and it is directed that entry no. 5009 made on 20.12.83 and entry no. 5013 made on 13.1.84 shall be restored. Petition is allowed. Rule is made absolute. No costs.

[R.S.GARG, J.]

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